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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1370

ALEXANDER H. LINDSAY,
Appellant,

v.

JOSEPH J. KELLY, JR.,
Secretary of the Commonwealth of Pennsylvania,
Appellee.

JURISDICTIONAL STATEMENT.

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Appellee.

JURISDICTIONAL STATEMENT.

And now comes the Appellant above named by his counsel, and under and in pursuance of Rule 15 of the Rules of the Supreme Court makes the following Jurisdictional Statement:

I. ORDER OF SUPREME COURT OF PENNSYLVANIA FROM WHICH APPEAL ARISES.

(a) This appeal arises from judgment of the Supreme Court of Pennsylvania in *Irvin Stander and Alexander H. Lindsay v. Joseph J. Kelley, Jr., Secretary of the Commonwealth of Pennsylvania, No. 38,* which opinion and judgment were rendered and entered February 7, 1969. The Opinion of the Court, together with the concurring opinion of Justice Roberts and the dissenting opinion of Justice Cohen,

appear hereinafter as Appendix A(1), A(2) and A(3), respectively and are reported at 433 Pa. 406.

II. GROUNDS FOR JURISDICTION.

(a) Statutory Authority.

This is a proceeding on appeal from a judgment of the Supreme Court of Pennsylvania holding that a legal enactment and constitutional amendment under the laws of Pennsylvania was not repugnant to the Constitution of the United States. This appeal is taken under and pursuant to Section 1257(2), 28 U. S. C. A. as follows:

> "1257. *State Courts—Appeal—Certiorari*—Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(b) Nature of the Proceeding.

This action challenges as contrary to federally guaranteed rights, an Act of the Pennsylvania Legislature authorizing non-elected delegates to participate in a limited constitutional convention for amending the State Constitution. This action challenges, moreover, the conduct of delegates to the State Constitutional Convention in exceeding the authority purportedly given by the legislation in question. The legislation and conduct which followed it have denied to the citizens of Pennsylvania rights guaranteed by the due process and equal protection requirements of the fourteenth amendment to the Federal Constitution.

On March 15, 1967 the General Assembly of the Commonwealth of Pennsylvania approved Act No. 2 which required submission to the electorate of a proposal to call a constitutional convention. The Act provided for 163 convention delegates. Only 150 were to be elected; the other 13 were non-elected delegates to serve by reason of the legislative office already held by them. In providing for these 13 ex-officio delegates with full voting power, the Legislature of Pennsylvania predetermined to disfranchise almost a million Pennsylvania electors. The weight of $^{13}/_{150}$th or 8.67% of Pennsylvania's voters was eliminated. In addition, this preconstituted a militant nucleus of legislative chiefs to persuade, maneuver and which did control the entire convention. Federal guarantees of due process and equal protection were shattered by the mere existence of this specially interested corps of legislators.

It is not the existence alone of this non-elected elite, of which appellant complains. In their excessive interest in protecting and enhancing the power of the legislature, this group has upset Pennsylvania's tripartite form of government and eliminated a constitutional guarantee of jury trial in civil cases. To do this the delegates had to completely disregard the limited purpose for which they were called. The convention's authority to consider the judiciary was limited to matters involving administration and organization of the courts, and the selection and tenure of judges, only. The convention usurped public authority and intruded upon the jurisdiction of the Pennsylvania Supreme Court by making the Court's jurisdiction subject to the will of the Legislature and eliminated the right to jury trial in civil cases.

Because of Pennsylvania's failure to afford the guarantees of due process and equal protection, she may no longer boast of a constitutionally protected tripartite gov-

ernment and an independent judiciary. Article V, Section 10(c), of the Amended Constitution denies to the Pennsylvania Supreme Court the right to review legislation dealing with the jurisdiction of that or any court.

As a protection against short-term popular whim, the State Constitution required that constitutional amendments be (1) passed by two legislatures; (2) advertised three months before the election of the second legislature and three months before the general vote; and (3) voter approved. Act No. 2 ignored these mandatory constitutional safeguards without excuse.

In the 94 years of its existence, the Pennsylvania Constitution has been changed by these mandatory procedures on numerous occasions. As recently as May 16, 1967 nine articles were amended, involving more than 60 sections, 5 were entirely new. As a wholly inadequate substitute and without reasonable notice to the electorate, the Pennsylvania Legislature has tried by Act No. 2 to raise itself by its bootstraps to the level of a constitutional convention by changing the method of amendment.

Dissatisfied with their Constitution and unwilling to follow the constitutionally mandated method of amending it, the Pennsylvania legislature passed Act No. 2. Thereby the protections of constitutional government were circumvented and the electors of Pennsylvania were required to vote a constitution with only 18 days within which to become informed.

It is no answer, as cynics suggest, that voters who were interested took the time and trouble to cast an informed ballot. These convention proposals covered over 9,500 words in a document which will never be noted for its simplicity. The flagrantly reduced time during which Pennsylvania electors could inform themselves of its content is patently contrary to the due process requirements of the fourteenth amendment.

(c) Time for Filing Appeal.

The time of appeal is submitted to be governed by Title 28, Section 210(c), U. S. C. A.

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period of time not exceeding sixty days."

(d) Applicable Proceedings in the Courts of Pennsylvania and the Dates Thereof Are as Follows:

1. Complaint in Equity requesting that the election be rstrained and other appropriate relief filed in the Court of Common Pleas, Dauphin County, Pennsylvania, April 11, 1968.

2. Order of Dauphin County Court Denying Preliminary Relief entered April 11, 1963.

3. Order of the Supreme Court of Pennsylvania affirming the denial of preliminary relief without prejudice entered October 11, 1969. Majority, two Concurring and Dissenting Opinions, appendix B1, B2, B3 and B4, respectively, reported at 432 Pa. 1, 246 A. 2d 649.

4. Plaintiff's Amended Complaint Limiting Challenge to Amendments of Judiciary Article was filed November 8, 1968.

5. Order of Dauphin County Court Denying Permanent Relief dated November 26, 1968.

6. Order of Supreme Court of Pennsylvania Affirming Judgment of Dauphin County Court Denying Permanent Relief—Order dated February 7, 1969. Majority, Concurring and Dissenting Opinions, Appendix A1, A2 and A3, respectively, reported at 433 Pa. 406.

7. Notice of Appeal was filed and copies served on parties and counsel pursuant to Rules 10 and 33 on April 25, 1969. Appendix C.

(e) Cases Believed to Sustain Jurisdiction of This Court Are as Follows:

1. On Issue of Ex-Officio Delegates:

Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691;
Gray v. Sanders, 372 U. S. 368, 83 S. Ct. 801;
U. S. v. Carolene Products Co., 304 U. S. 144, 58 S. Ct. 778;
Traux v. Corrigan, 257 U. S. 312, 42 S. Ct. 124 (1921);
Wheeling Steel v. Glander, 337 U. S. 562, 69 S. Ct. 1291 (1949);
Snyder v. Commonwealth of Mass., 291 U. S. 97, 54 S. Ct. 330 (1934);
Chicago, Burlington and Quincy Rd. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581 (1817);
Luther v. Borden, 7 How. 1 (1849);
Lucas v. Colorado General Assembly, 377 U. S. 713, 84 S. Ct. 1459 (1964);
Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446 (1927);
Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362 (1964);
Wesberry v. Sanders, 376 U. S. 1, 84 S. Ct. 526 (1964).

2. Representative of other issues:

Armstrong v. Menzo, 380 U. S. 545, 85 S. Ct. 1187 (1965);

Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278;

Priest v. Board of Trustees of Town of Las Vegas, 232 U. S. 604, 34 S. Ct. 443, 58 L. Ed. 751;

Roller v. Holly, 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed. 520;

Grannis v. Ordean, 234 U. S. 385, 34 S. Ct. 779;

Schroeder v. City of New York, 371 U. S. 208, 83 S. Ct. 279 (1962);

Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 694 (1966).

(f) Texts of Applicable Sections of Pennsylvania Constitution and Statutes:

Several provisions of the Constitution of the Commonwealth of Pennsylvania and Legislative Enactments are pertinent to the within matter.

1. Article XI, § 1, of the Pennsylvania Constitution, which is the only constitutionally sanctioned method for amending that Constitution, is as follows:

"§ 1. *Proposal of Amendments by the General Assembly and their adoption*

Amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the

same shall be agreed to by a majority of the members elected to each House, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each House, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner, and at such time at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately."

2. The portions of Act No. 2 relating to this action which provides for the calling of a limited convention, the appointment of 13 ex officio delegates, and method of publication are as follows:

Section 2. Convention; Membership; Qualifications; Vacancies.

(a) . . . In addition, the Lieutenant Governor, the President Pro Tempore of the Senate, the Majority

Leader of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Leader of the House, the Majority Whip of the House, the Minority Leader of the House, the Minority Whip of the House and the Minority Caucus Chairman of the House shall be members ex officio of the convention and shall have the powers of elected delegates.

Section 7. Substantive Powers of the Convention; Limitations; Mandatory Duties of the Convention.

(a) Except as hereinafter provided in subsection (b), the constitutional convention shall have the power by a vote of a majority of the one hundred sixty three to make recommendation to the electorate on the following subjects only (i) Legislative Apportionment (now covered by sections 16, 17 and 18 of Article II of the Constitution, (ii) Judicial Administration, Organization, Selection and Tenure (now covered in part by Article V of the Constitution), ...

Section 8. Manner of Submitting Proposals to the Electorate.

(b) The changes proposed, together with the questions framed by the convention, shall be certified by the president and secretary of the convention to the Secretary of the Commonwealth not later than the seventh day of March, 1968. The secretary of the Commonwealth shall advertise the proposals of the convention in at least two newspapers of general circulation, if there are such, in every county of the Commonwealth once during the first week in April, 1968. He shall also

publish the Constitution showing the changes proposed by the convention in convenient form and send a copy thereof to each elector requesting it, and ten copies thereof through the County Board of Elections to each polling place for the use of the voters during the election.

3. Those sections of the amended Constitution of Pennsylvania applicable here are as follows:

Section 1. Unified Judicial System.

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Section 2. Supreme Court.

The Supreme Court (a) shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth.

(b) shall consist of seven justices, one of whom shall be the Chief Justice; and

(c) shall have such jurisdiction as shall be provided by law.

Section 10. Judicial Administration.

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace, and

all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for the admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this, with the constitution and neither abridge, enlarge or modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace. . . .

Schedule Section 1. The Supreme Court.

The Supreme Court shall exercise all the powers and, until otherwise provided by law, jurisdiction now vested in the present Supreme Court and, until otherwise provided by law, the accused in all cases of felonious homicide shall have the right of appeal to the Supreme Court.

III. QUESTIONS PRESENTED BY APPEAL.

Inasmuch as there is no factual dispute, facts set forth herein are for the purpose of clarity in framing the issues.

1. The enabling Act calling for a referendum for a constitutional convention provided for the appointment of 13 ex-officio delegates. As mentioned before, these delegates were members of the legislature and, even though not elected to the convention, they were vested with full delegate power and authority. The effect of such a procedure is to disfranchise approximately one million voters of the state. Thus, the basic question presented is whether such action does violence to the equal protection clause of the

fourteenth amendment to the United States Constitution. Constitutional conventions with power to make and revise the organic structure of government and the basic rights of the people demand no less sanction of the fourteenth amendment than a mere legislature. Does, therefore, a disproportioned voting weight, whether in the legislature or a constitutional convention, deny rights of due process and equal protection, guaranteed by the fourteenth amendment?

2. This appeal raises also the age-old conflict between legislatures and courts for supremacy in reviewing legislation. Who has the final say on the constitutionality of legislation? The authority of Pennsylvania's constitutional convention was limited. With respect to the judiciary, the convention had no power to consider jurisdiction of the courts or jury trials in civil cases. Not satisfied with its mandate, the convention not only acted in these matters but rendered the legislature supreme. Are not the people of Pennsylvania entitled to a supreme judiciary? Certainly they must not be deprived of it by a constitutional convention which has acted beyond its authority where the people have no reasonable opportunity to discover this unauthorized conduct before being required to vote.

3. May a majority, even where led by an executive and legislature in power, change the organic law by other than means which they have made a part of their constitutional protections?

Since 1874, Pennsylvanians have been protected against whimsical popular change in their organic law by constitutionally requiring submission of amendments to two separate General Assemblies and approved by the electorate with three months' notice. In proposing Act No. 2, the Pennsylvania legislature has ignored these safeguards. The convention product went directly to the people only 18 days

after publication. Are not the people of Pennsylvania guaranteed by the fourteenth amendment of the United States Constitution that their state constitution will not be altered by other than constitutionally mandated means? Are they not guaranteed at the very least the reasonable opportunity for debate and discussion necessary to an informed electorate?

IV. SUBSTANTIALITY OF GROUNDS.

A. Ex Officio Delegates.

Of prime importance in this appeal is the failure of the Commonwealth of Pennsylvania to insure to every person the equal protection of the law. In selecting delegates to their constitutional convention, Pennsylvania residents were denied the equality of voting weight demanded by the fourteenth amendment of the United States Constitution.

A senatorial district in Pennsylvania is comprised of approximately 226,000 persons. Act No. 2 provided for 150 elected delegates, three from each of the senatorial districts. It also provided for 13 "ex officio" delegates with accreditation equal to any of the elected delegates. By a simple arithmetic calculation, it is evident that each of the elected delegates represented approximately 75,000 people. for the 13 "ex officio" delegates, there were therefore 975,000 persons or 1/11 of the entire population of the Commonwealth of Pennsylvania to whom a disproportionate voice was given.

The arithmetic of franchise debasement is apparent: Either the 13 non-elected delegates over represented 975,000 people or, conversely, the entire population was under represented by the voting weight of these 13 members, disfranchising almost a million persons. Moreover, the people were not simply disfranchised by the disproportioned electorate, but by the design of those detractors from democ-

racy who would not trust the people in convention without imposing on them the protection of "ex offianados".

Whether inequality in representation is the result of absolute disfranchisement, *Nixon v. Herndon*, 273 U. S. 536 (1927), districting and apportionment *Baker v. Carr*, 369 U. S. 186 (1962) and *Reynolds v. Sims*, 377 U. S. 533 (1964), or the County Unit Systems of selecting candidates in primaries, *Gray v. Sanders*, 372 U. S. 368 (1963), the clear principle against which the inequality is measured is ". . . solemnly embodied in the Great Compromise . . . equal representation . . . for equal numbers of people . . .". *Wesberry v. Sanders*, 376 U. S. 1, 14 (1964). Moreover, the ". . . court's plain objective [is] that of making equal representation for equal numbers the fundamental goal . . ." Ibid., 376 U. S., at 17.

A convention organized to consider basic law under which sovereign people shall be governed must be bound to the will of the electorate. Without equal representation for equal numbers, representative government fails at the outset. *Gray v. Sanders, supra*, p. 378, recognized the multilateral application of equal protection in referring to ". . . phases of the problem of representation in state and federal legislatures or *conventions* . . ." (Emphasis added.)

It is startling that had Pennsylvania amended its Constitution in the usual way, the proposals would have been submitted to an equally proportioned General Assembly on two separate occasions. To accept the product of this intentionally disproportioned convention would allow a state to do indirectly—through convention—what it could not do directly through a disproportioned legislature.

It is no answer that a majority of Pennsylvania electors approved this inequality in representation. In *Lucas v. Colorado General Assembly*, 377 U. S. 713 (1964), this Court

demanded a judicial remedy notwithstanding the Colorado electorate's approval of its disproportioned legislature.

> "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate . . . As stated by this court in *West Virginia State Bd. of Educ. v. Barnette,* 319 U. S. 624, 638, 'One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."

The Court held that ". . . the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the equal protection clause . . ." *Lucas, supra,* p. 737.

A constitution must by its nature be an expression of the will of the people. Constitutional conventions are a substitute for a gathering of the people and find authority only insofar as delegates represent the people. Where 1/11 or 8.6% of the convention delegates lack any credentials from the people, the convention's product cannot express the people's will. The Equal Protection clause of the fourteenth amendment demands the conclusion that there was no constitutional convention because it could not speak for the people.

B. Judicial vs. Legislative Supremacy.

By Act No. 2 the constitutional convention was limited, with respect to the judiciary, to consideration of the administration and organization of the courts and selection and

tenure of judges. Notwithstanding this limited authority, the convention chose on its own initiative to go beyond these restrictions by repealing the entire former judiciary article. It substituted a new judiciary with jurisdiction so controlled by the legislature that Pennsylvanians may no longer boast of the tripartite government to which they are entitled.

The history of conflict between the judiciary and legislature is long, troubled and well known. Arguments for or against judicial supremacy have long ago been answered in the language of Chief Justice Marshall and need not be belabored here.

Until Pennsylvania's recent constitutional convention, Pennsylvanians, like all Americans, enjoyed a tripartite form of government with a supreme judiciary. As a result of the convention's Proposals, this is no longer true. They have been deprived of it by a constitutional convention which allowed them only 18 days within which to discover the convention's excesses before being required to vote.

Section 2(c), 10(c) and Section 1 of the Schedule (quoted herein) of the Amended Constitution are those which accomplish the purpose of restricting the judiciary's review of legislation. This is particularly evident from Section 10(c) which allows the Pennsylvania Supreme Court the power to make rules governing practice and procedure, but then destroys the independence of the court by declaring that it shall not ". . . affect the right of the *General Assembly to determine the jurisdiction* of *any* court or justice of the peace . . . ." (Emphasis added) Sections 2(c) and Section 1 of the Schedule clearly provide that the jurisdiction of all of the courts of Pennsylvania is subject to the will of the legislature. The Pennsylvania Supreme Court no longer enjoys status as an equal partner in a tripartite government.

Indeed, this has been accomplished by the constitutional convention, usurping powers and exceeding its authority to consider administration, organization, selection and tenure. Moreover, this was presented to the people of Pennsylvania with only 18 days within which to form a collective judgment of the subtle meanings, purpose and effect.

Appellant submits that the usurpation of authority, the limited time within which to learn of it and the ultimate imbalance created between the judiciary and the legislature are, collectively and individually, a deprivation of the rights of the residents of Pennsylvania, guaranteed by the fourteenth amendment of the United States Constitution.

C. Abrogation of Pennsylvania Constitutional Protections.

Not so apparent in precedent but immensely significant in its broad application to modern social and political life is the third issue involved in this appeal. A need for constitutional reform in Pennsylvania was and is apparent. Under the terms of Pennsylvania's Constitution, however, amending it requires action by two separate legislatures, publication ninety days prior to the election of the second legislature and ninety days before the proposals are submitted to popular ballot. Well-intentioned perhaps, but unwilling to assume its constitutional burdens, the Pennsylvania Legislature passed Act No. 2, hoping to authorize but yet control a constitutional convention with a limited franchise.

In circumventing the built-in constitutional protections which afforded voters the opportunities of debate between proponents and opponents, and informed, intellectual analysis, the Pennsylvania legislature has engaged in constitution making. By eliminating an informed consent to

the constitutional amendments, the legislature has worked its will, not the people's.

We need not belabor here the struggle of combatants on behalf of law and order whose protest against guaranteed individual liberty has recently followed the fashion of constitutional revision. This kind of "reform" movement is or has been active in virtually every state and the Federal government. When, as under the United States Constitution, Americans are guaranteed that there is only one way in which their basic law can be changed, this writer believes that they have a right to demand that it will not be changed in any other way. It is unthinkable that a majority of the United States Congress could propose an act by which a majority of American voters could approve some other method of amending the United States Constitution. If this were possible, such a majority need not change the Bill of Rights to accomplish its purpose. It need only dilute the power or jurisdiction of the courts to strip minorities of their protection.

Appellant believes that the wrong perpetrated need not be in a harmful result. The evil of which we complain is in the means. If legislatures are allowed to depart from the mandated methods of amending constitutions, a court which waits for the unconstitutional result may well be a differently constituted court than the one which should have acted to strike down the unconstitutional conduct in the first instance.

This writer does not believe that the greatest threat to our future is from hydrogen bombs and guided missiles. Our civilization will not die that way. It will die only when no one cares. As Arnold Toynbee has pointed out, 19 of 21 civilizations have died not by conquest but from within. There were no bands playing nor flags flying when these civilizations decayed. It happened slowly, in the quiet and dark, when no one was awake.

We do not have here simply a departure from mandated constitutional requirements. The departure involved a virtual elimination of public investigation of the proprosals on which the electorate was required to vote.

Our law is replete with instances requiring reasonable notice of a threat to property rights. An elementary and fundamental requirement of due process in any proceeding is notice to interested parties which is reasonably calculated under all the circumstances to afford them an opportunity to present objections. *Armstrong v. Menzo*, 380 U. S. 545, 85 S. Ct. 1187 (1965); *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U. S. 604, 34 S. Ct. 443, 58 L. Ed. 751; *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed. 52.

As was observed in *Grannis v. Ordean*, 234 U. S. 385, 394, 34 S. Ct. 779, 783, a fundamental requirement of due process is "the opportunity to be heard." This opportunity must be granted at a meaningful time and in a meaningful way. "This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Schroeder v. City of New York*, 371 U. S. 208, 83 S. Ct. 279 (1962).

In matters involving the deprivation of personal liberties, this Court has demanded for criminal defendants an *informed* consent to any waiver of their fifth amendment guarantees. There must be a "voluntarily, knowing and intelligent relinquishment of the privilege. *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 694, 724 (1966).

In matters involving civil litigation, a patient cannot consent to surgery or a course of medical care without first being fully informed of the possible consequences.

Nowhere in our law is there a greater need for a reasonable opportunity "to know" than in the circumstances presented by this appeal. Pennsylvania voters were entitled to their mandated constitutional method of amendment. They were entitled to a reasonable opportunity to become informed. The denial of either or both of these elements is and must be regarded by this Court as a violation of their federally guaranteed rights of due process and equal protection.

CONCLUSION.

The handwriting on the wall; the echoes in the hills, are unalterably clear. America's next Constitutional Crisis —perhaps it is already here—is a national attack on judicial power.

Courts which demand and safeguard the constitutional guarantees of individuals and minorities are assaulted openly by restless and contemptuous majorities. In this political and social climate it is not surprising that legislators, anxious to speak for majorities, contrive means such as Pennsylvania's Constitutional Convention to circumvent the protections of an informed electorate.

Nor is it surprising that once converned, a convention speaking through the voices of 13 ex-officio delegates of legislators, assumes power beyond its mandate in order to effect control by the legislature over the judiciary.

Separation of power is one of the roots with which the tree of liberty fastens in the soil of real life, and through which it receives the sap of fresh existence. Not only is this principle eminently philosophical, but it must survive the ravages of time and expediency.

Not only the people of Pennsylvania, but the people in every state, will have cause to rejoice at their deliverance from the deprivation of rights employed by the Pennsylvania legislature.

It is respectfully prayed that this Court will tell the legislators of all States they will not contrive ex-officio, non-representative delegates to constitutional conventions. They will not deprive their people of constitutionally-sanctioned methods of changing their constitutions which provide a reasonable opportunity for the electorate to become informed. Nor will usurpation of authority by constitutional conventions or a change in the balance of legislative and judicial power be tolerated.

Respectfully submitted,

JAMES E. BEASLEY,
Attorney for Appellant.

APPENDIX A-1.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT.

No. 38, MAY TERM, 1969.

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

OPINION OF THE COURT.

BELL, *C. J.*

On April 23, 1968, the eligible voters of Pennsylvania adopted several amendments to the Constitution of Pennsylvania. Included among these was a complete revision of Article V relating to the Judiciary. The vote approving the new Judiciary Article, which superseded the old Judiciary Article, was 910,855 in favor and 729,845 against.

The plaintiffs, taxpayers and owners of real estate in Pennsylvania, on April 11, 1968 filed a taxpayers' Complaint in Equity against the Secretary of the Commonwealth in the Dauphin County Common Pleas Court, in which the Court was asked to enjoin a vote by the electorate on the new proposed Constitutional Amendments and to hold them invalid and void.

The plaintiffs, on April, 1968, had originally attempted to obtain a preliminary injunction which sought to enjoin the Secretary of the Commonwealth from printing the questions pertaining to the Constitutional amendments on the ballots to be furnished the electors at the April 23, 1968 election. The Dauphin County Common Pleas Court refused to grant the *preliminary* injunction, principally on the basis of the plaintiffs' laches* in waiting until the "eve" of the election to bring their action. An appeal was taken to this Court, which affirmed the dismissal of the preliminary injunction on the ground that the Court below had not committed a clear abuse of discretion or a palpable error of law: *Stander v. Kelley*, 432 Pa. 1, — A. 2d —. An amended complaint was thereafter filed seeking permanent equitable relief. This too was denied by the Dauphin County Court and its Order dismissing the complaint and entering a decree in favor of the defendant serves as the basis for the present appeal.

Because of the tremendous importance of this question to all the people of Pennsylvania, we shall first point out what questions are, and what questions are not involved, and then discuss several of the contentions made by the Commonwealth and all of the principal contentions made by

* The proposed amendments were first advertised in the first week of April (April 5), 1968. The plaintiffs brought a bill to enjoin the election on April 11, 1968, which under all the facts did not constitute laches.

the appellants.* The broad question involved is whether the new Judiciary Article V, which in practical effect repealed Article V of the Constitution of 1874, is Constitutional or is null and void. It is unnecessary at this time and in this case to unravel the conflicts or to interpret the many ambiguities which exist in the new Judiciary Article, or the wisdom or foolishness of any of its provisions. Speaking more specifically, the questions involved are: Was the new Judiciary Article adopted by the people without violating the existing Pennsylvania Constitution of 1874, or the Constitution of the United States, or any pertinent Act of the Legislature?

JUSTICIABILITY.

The Commonwealth contends that none of the questions raised by appellants nor the Constitutionality of the new Judiciary Article itself is justiciable, because the ultimate sovereign power of our Government reposes in the people and the people have approved by their vote the new Judiciary Article. The Attorney General supports this position by a reference to *Woods's Appeal,* 75 Pa. 59; *Wells v. Bain,* 75 Pa. 39; *Armstrong v. King,* 281 Pa. 207, 126 Atl. 263; *Taylor v. King,* 284 Pa. 235, 130 Atl. 407.

In *Taylor v. King,* 284 Pa., supra, the Court considered a mandamus action to compel the Secretary of the Commonwealth to advertise a proposed Constitutional Amendment. The Court said, inter alia (page 239):

"The Constitution of the State may be legally amended in the manner specifically set forth therein, *or a new one may be put in force by a convention duly assembled, its action being subject to ratification by the people,*** but these

* Briefs of the parties and of the amici curiae totaled, exclusive of the voluminous exhibits, 220 pages.

** Italics, ours.

are the only ways in which the fundamental law can be altered. . . .

"There may be technical error in the manner in which a proposed amendment is adopted, or in its advertisement, yet, if followed, unobjected to, by approval of the electors, it becomes a part of the Constitution. . . ."

In *Armstrong v. King,* 281 Pa., supra, the Court held that the bonus amendment which had previously been submitted to and rejected by the people under the authority of Article XVIII of the 1874 Constitution could not again be submitted within the five-year period, and enjoined the officers of the Commonwealth from advertising the proposed amendment. The case is well stated in the Syllabus (page 207): "5. Where such proposed amendment has been adopted by two successive legislatures, has been approved by a majority of the electors, has been acted upon by those charged with administration under it, and public or private rights would be injuriously affected by setting it aside, it is too late to do so, even by a direct attack on the ground that it was submitted for approval at the wrong time, and it cannot then be collaterally attacked for any reason." The Court said (page 214): "Under what circumstances, if any, a direct attack can be made on a constitutional amendment, after adoption by the people, because of a failure to comply strictly with some procedural condition leading up to the submission, has been the subject of many and lengthy opinions, with results impossible of reconciliation." Although unnecessary to the result reached, the Court again approved the calling of a Convention to amend the Constitution of this Commonwealth if approved by vote of the people, and stated that mere errors of procedure would not invalidate the vote of the people.

The Attorney General contends that the aforesaid cases hold that the Constitutionality of a Constitutional

amendment can be challenged in the Courts *before* its approval by the electorate, *but never after.* Although some language in these cases may support the Commonwealth, this Court, nevertheless did take jurisdiction and considered the questions raised.

Woods Appeal, 75 Pa. 59, contains some language, as do the cases above, which supports the Attorney General's contention that a Constitutional amendment can be challenged in the Courts *before* its approval by the electorate *but never after.* Assuming these cases are apposite, if they hold as the Commonwealth contends, the foolishness of such a holding in the present era is obvious. If there is a palpable violation or violations of the existing Constitution, the Commonwealth contends that that question or issue is *justiciable* if decided by the Courts one week or *one day prior* to the election, *but is not justiciable one day after* the people have voted to approve or adopt the Amendment, no matter how clearly the provisions of the existing Constitution may have been violated. Furthermore, under the theory of the Commonwealth, a trial Court or an appellate Court could unintentionally or intentionally enable a palpable violation or violations of the Constitution of Pennsylvania, or of the Constitution of the United States, to become Constitutional and non-justiciable,* if, through an overload of work, or inadvertence, or laziness, or incompetence, or illness, or for any reason whatsoever it failed to render a decision before the question was approved by the vote of the people. However, the recent decisions of the Supreme Court of the United States are analogous and controlling. They expressly and specifically hold that (1) *a vote of the people* cannot validate and Constitutionalize anything which violates a provision of the Constitution, and (2) *this question*

* Other jurisdictions (*State v. Holman,* 296 S. W. 2nd 482; *Stovell v. Gartrell,* 332 S. W. 2nd 256) have held to the contrary.

or issue of Constitutionality is justiciable after the voters have adopted such a provision: Baker v. Carr, 369 U. S. 186; *Reynolds v. Sims,* 377 U. S. 364; *Wesberry v. Sanders,* 376 U. S. 1; *Lucas v. 44th General Assembly of Colorado,* 377 U. S. 713; *Jordan v. Silver,* 381 U. S. 415; Cf. *Hunter v. Erickson,* 37 U. S. L. W. 4091 (Jan. 20, 1969); cf. also *Butcher v. Bloom,* 420 Pa. 305, 216 A. 2d 457.

These cases demonstrate that Constitutionally ordained rights must and will be protected by the Courts against the will as well as against the vote of a majority of the people In *Lucas v. 44th General Assembly of Colorado,* 377 U. S., supra, the Court pertinently said (pp. 736-737): "Courts sit to adjudicate controversies involving alleged denials of constitutional rights. . . . An individual's constitutionally protected right to cast an equally weighted vote cannot be denied *even by a vote of a majority of a State's electorate,** if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. As stated by this Court in West Virginia State Bd. of Educ. v. Barnette, 319 U. S. 624, 638, *'One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'* * *A citizen's constitutional rights can hardly be infringed simply because a majority of the people chose that it be.** We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in Reynolds v. Sims."

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* Italics, ours.

In *Jordan v. Silver*, 381 U. S. 415, the California Constitution reserved to the people of California the power to propose Constitutional amendments by filing a petition with the Secretary of State, signed by eight per cent of the persons who voted in the preceding gubernatorial election. The voters of California approved a plan to provide a Federal-type plan for the election of senators and representatives in California. The plan provided, inter alia, for a Senate composed of 40 members with detailed provisions for their senatorial districts. This plan was approved by a vote of the people, and three times thereafter the people voted against changing this apportionment system for the senatorial election. Notwithstanding the vote of the people, the Supreme Court held this senatorial apportionment and election by the people to be invalid under the Court's decisions in *Reynolds v. Sims*, 377 U. S. 533, and companion cases.

To summarize: It is a traditional and inherent power of the Courts to decide all questions of Constitutionality, and the recent decisions of the Supreme Court of the United States hold that alleged violations of the Constitution are justiciable even after they have been voted upon and approved by the people.

THE USE OF THE CONSTITUTIONAL CONVENTION.

On March 15, 1967, the Governor of Pennsylvania approved Act No. 2 of 1967 which provided for a limited Constitutional Convention. Appellants contend that this Constitutional Convention method was unconstitutional because Article XVIII of the 1874 Pennsylvania Constitution* sets forth in great detail the manner in which the Constitution of Pennsylvania may be amended and contains no pro-

* Article XVIII has since been renumbered by proclamation of the Governor as Article XI.

vision for the calling of a Constitutional Convention. Nevertheless, this Court has several times previously held that amendments to our prior and existing Constitution may be initiated by the calling of a Constitutional Convention, provided a majority of the electors vote in favor of such a call. Unmindful of the fact that the Constitution of 1874, which has been the framework of our State Government for over 90 years, was adopted by the convention method at a time when the amendatory provisions of the then existing Constitution did not prescribe a convention as a method for Constitutional change, appellants contend that nowhere in any Article or provision of the Constitution is there any authority for the calling of a Constitutional Convention for the purpose of permitting the people to amend the Constitution. Appellants also forget that the provisions for the adoption of the Constitution of the United States directly contravened Article XIII of the Articles of Confederation which were drawn up and submitted to the people through a Constitutional Convention, and that 12 of the original 13 State Constitutions contained no amendment provisions, yet all of them were amended from time to time by the Convention method. Appellants further contend that a failure to follow the clear and specific amendment provisions renders the new Judiciary Article invalid and void.

We reaffirm our prior decisions which have consistently held that so long as a Constitutional Convention is not expressly prohibited by the then existing Constitution, it represents a proper manner and method in which the citizens of Pennsylvania *may initiate* an amendment of their Constitution. *Taylor v. King,* 284 Pa., supra; *Armstrong v. King,* 281 Pa., supra; *Wells v. Bain,* 75 Pa., supra; *Woods's Appeal,* 75 Pa., supra; Article 1, Section 2, of the 1874 Constitution of Pennsylvania.

CONFORMITY WITH THE CONSTITUTIONAL AMENDMENT PROCEDURES.

1. *Notice and Advertisement.*

Article XI of the Pennsylvania Constitution of 1874, set forth above, provides that proposed amendments to the Constitution shall be published "three months" before being submitted to the people. In this case, notice of the amendment proposals were published on April 5, 1968, only eighteen days before the election. Appellants contend that the failure to give notice in accordance with Article XI renders the approved amendments illegal and void.

It is undoubtedly true that in matters relating to the alteration or amendment or change or abolition of the Constitution, which is the fundamental Law of our Commonwealth, all the clear and mandated provisions of the Constitution must be strictly followed and obeyed and no departures from or circumventions or violations of existing mandatory Constitutional amendment requirements will be permitted. *Commonwealth ex rel. Attorney General v. Beamish,* 309 Pa. 510, 164 Atl. 615. However, the appellants misconstrue what has taken place here. These new amendments to or revision of the Constitution were not adopted pursuant to the provisions of Article XI of the Constitution of 1874, but were adopted pursuant to and through a different manner of amendment—the Constitutional Convention. As we said earlier, this Court has declared that the convention method of amending the Constitution is lawful. Since, as we have above held, the electorate may employ the convention process for amending the Constitution, it follows that the people have the right to determine initially or by ratification the manner and matter of notice and times of publication which they desire or are willing to sanction. Act No. 2 of 1967 specifically provides: "The Secretary of the Commonwealth shall advertise the pro-

posals of the convention in at least two newspapers of general circulation, if there are such, in every county of this Commonwealth once during the first week in April, 1968." The Secretary has complied with this direction or mandate and, accordingly, we hold that notice and advertisement was timely and adequate.

We further note that in both 1836 and in 1873 the existing provision of the Constitution with regard to advertising was not followed in the Act setting up the convention, and in the instant matter *the complete text* of the proposed Constitution was published on April 5, 1968, in 134 newspapers which were published and circulated throughout the entire Commonwealth.

2. *The Ballots.*

Appellants also challenge the form of the notice of the proposed Constitutional amendments as it appeared on the ballots submitted to the electorate at the April 1968 primary election. The ballot question relating to the Judiciary Article amendment read as follows: "JUDICIARY—Ballot Question V: Shall Proposal 7 on the JUDICIARY, adopted by the Constitutional Convention, establishing a unified judicial system, providing directly or through Supreme Court rules, for the qualifications, selection, tenure, removal, discipline and retirement of, and prohibiting certain activities by justices, judges, and justices of the peace, and related matters, be approved?"

It is obvious that this question as printed on the ballots is but a tiny and minuscular statement of the very lengthy provisions of the proposed Judiciary Article V. It is equally clear and realistic beyond the peradventure of a doubt that a lengthy summary of the proposed Judiciary Article could not have been printed on an election ballot. The first and most important question on this point is:

Does the question as stated on the ballot fairly, accurately and clearly apprize the voter of the question or issue to be voted on? Our answer to this question is "Yes." In recognition of this right of the electorate to be clearly and more fully informed of the question to be voted on, the Legislature by Act No. 2 of 1967 required the Secretary of the Commonwealth to "also publish the Constitution showing the changes proposed by the convention in convenient form and send a copy thereof to each elector requesting it, and ten copies thereof through the County Board of Elections to each polling place for the use of the voters during the election." The Secretary of the Commonwealth complied with this mandate.

Appellants contend that the electorate had no more idea or knowledge of the "notice" requirements, or of the real question stated on the ballot than it knew what it was approving when it adopted the new Constitutional amendment in April of 1968. In a Republican or Democratic form of Government, a similar contention is made after almost every election—the people didn't know or did not understand what (or whom) they were really voting for. This generalization has never been proved and will not be assumed by us.

AMENDMENT MORE THAN ONCE IN FIVE YEARS.

Article XVIII of the Constitution of 1874 and Article XI of the new Constitution provide: ". . . no amendment or amendments shall be submitted oftener than once in five years . . ." In 1965, an amendment to the Judiciary Article which pertained to the assignment by the Chief Justice of former Judges was submitted to and approved by the electorate. Appellants contend that an adoption of the new Judiciary Article violates Article XVIII of the Constitution of 1874 and also of the specific provisions of the new Judiciary Article.

The amendments here in issue were, we repeat, not adopted pursuant to Article XVIII but were adopted in and by a different *lawful* manner. Furthermore, in *Commonwealth ex rel. Margiotti v. Lawrence*, 326 Pa. 526, 193 Atl. 46, this Court said (pages 534-535): "'. . . The clause "but no amendment . . . shall be submitted oftener than once in five years" . . . clearly *refers to such as has already been submitted** and rejected in light of the language used . . . it refers to an amendment that has been submitted before and rejected and not to one that was never before submitted.'" Accord, *Commonwealth v. King*, 278 Pa. 280, 122 Atl. 279.

The prior proposed amendments which were adopted by the people were different from the 1968 amendments to the new Judiciary Article and do not preclude or prohibit the 1968 amendments.

NON-ELECTED DELEGATES.

Act No. 2 of 1967 provided for the election of 150 delegates and the selection of 13 delegates. These 13 delegates were political leaders of the Legislature* and "shall be members ex officio of the convention and shall have the powers of elected delegates."

Appellants contend that since thirteen of the 163 members of the Constitutional Convention were not elected to the convention, almost a million citizens of Pennsylvania were disenfranchised in their representation at the conven-

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* Italics, ours.

* The Lieutenant Governor, the President Pro Tempore of the Senate, the Majority Leader of the Senate, the Majority Whip of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Whip of the House, the Majority Leader of the House, the Minority Leader of the House, the Minority Whip of the House, and the Minority Caucus Chairman of the House.

tion. They point out that since 82 votes (a majority) could approve a proposal at the convention, and if the thirteen non-elected delegates should be included in these 82, then only 69 of the 150 delegates elected by the people would be needed to adopt a proposal.

Appellants further specifically claim that the existence of non-elected delegates deprives the voters of Pennsylvania of equal representation to which they are entitled under the equal-protection clause of the Fourteenth Amendment to the Constitution of the United States. In support of this contention, appellants cite the recent reapportionment cases of the United States Supreme Court, including *Baker v. Carr,* 369 U. S. 186; *Reynolds v. Sims,* 377 U. S. 533; and *Gray v. Sanders,* 372 U. S. 368, and *Lucas v. Colorado,* 377 U. S., supra. Cf. also the very recent case of *Hunter v. Erickson,* supra (January 20, 1969).

The function of the Constitutional Convention was to propose and *recommend* to the electorate of Pennsylvania changes and alterations in the existing State Constitution. The Convention had no law-making powers of any kind. Act No. 2, Sections 7, 8 and 9. The approval or disapproval of the Constitutional Convention's proposed amendments in April of 1968 was submitted to the electorate of Pennsylvania solely on a statewide basis, which is the purest form of "one man, one vote." If the convention which submitted the proposals did not represent all of the voters of the State equally, this defect was clearly cured by the approval of the voters at the April 28, 1968 statewide election.

We find no merit in this contention of appellants.

Since the delegates to the Constitutional Convention had no power to bind the people, and since a majority of the electorate of Pennsylvania voted to adopt the new Judiciary Article, the appellants cannot claim injury or Constitutional infirmity from the manner in which the delegates were chosen.

Discrepancies Between Convention Journals and the Final Proposed Amendments.

This contention of the appellants has so little merit that we shall dismiss it by merely referring to the following cases which specifically or by analogy decide the question adversely to the appellants. *Mikell v. Philadelphia School District,* 359 Pa. 113, 124, 58 A. 2d 339; *McGuigen Estate,* 388 Pa. 475, 482, 131 A. 2d 124; *Martin Estate,* 365 Pa. 280, 74 A. 2d 120, and cases cited.

Habeas Corpus and Waiver of Jury Trial.

Appellants' contention that (1) the right of the people to a writ of habeas corpus and (2) their right to a jury trial has been abrogated or nullified, is utterly and completely devoid of merit. See Article I, Sections 6 and 9 and 14, and Article V, Section 25, of the new Constitution of Pennsylvania; and Article I, Section 9(2) and Article III, Section 2(3) of the Constitution of the United States.

Separation of Powers.

Appellants vigorously urge this Court to declare the new Judiciary Article of the Pennsylvania Constitution null and void on the ground that it violates the traditional and fundamental concepts inherent in the separation of jurisdiction and powers among the three branches of our Republican Form of Government (Art. IV, Sec. 4, of the Constitution of the United States). Throughout the history of our Country, the dividing line between and the boundaries and powers of the three separate co-equal branches of our Government,—namely, the Executive and the Legislative and the Judicial—are sometimes indistinct and are probably incapable of any precise or exact definition. This indefiniteness and unboundarized jurisdiction

and power has often caused heated controversy in our National Capital. Generally speaking, the Executive branch has the power to recommend legislation and the power and the duty to see that the laws are faithfully administered and carried out. The Legislative branch has the power and the duty to pass legislation; and the Courts have the power, the duty and the responsibility of interpreting the Constitution and all legislation and determining whether legislation and presidential orders and all other questions and issues meet or violate the requirements of the Constitution.

In the light of these premises, we shall now discuss more specifically the provisions of the new Judiciary Article which are alleged to violate, obliterate and destroy the jurisdiction and the powers of the third branch of our Government, namely, the judiciary, and in this case particularly, the Supreme Court of Pennsylvania.

The new Article V provides:

"Unified Judicial System

Section 1. The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, . . .

"Supreme Court

Section 2. The Supreme Court (a) shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth;

. . .

"Judicial Administration

Section 10. (a) The Supreme Court shall exercise general supervisory and administrative authority over

all the courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate.

(b) The Supreme Court shall appoint a court administrator and may appoint such subordinate administrators and staff as may be necessary and proper for the prompt and proper disposition of the business of all courts and justices of the peace.

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."

The Judiciary Article provides for additional powers to be vested in and exercised by the Supreme Court. However, in numerous other provisions of the new Judiciary Article for the whole State, and likewise special provisions for the City of Philadelphia, Allegheny County and the

City of Pittsburgh, the Article contains language "until otherwise provided by law," or similar language.*

The Constitution of 1874 contained similar provisions which used the phrase "as shall or may be provided by law", or almost identical language.** In the 94 years of its existence, this or similar phraseology was interpreted by the Supreme Court and caused no serious dissension or irreparable conflicts.

Appellants have raised a number of additional objections which relate in lesser or greater degree to the broad question of separation of powers. These include the contention (a) that the new Article V went beyond the call of the Convention, and (b) that the Legislature may not be given the power to establish new Courts, even though under Article V, Section 1, of the Constitution of 1874 the Legislature has over the years established the Superior Court as well as additional County and Municipal Courts, and (c) that there has been a deprivation of the original jurisdiction of the Supreme Court as ordained in the 1874 Constitution and an infringement of the King's Bench powers of the Supreme Court. We find each of these contentions to be devoid of merit on the issue here involved.

When the meaning or interpretation and the Constitutionality of a particular provision, section or sentence of the new Constitution is properly raised, the question and issue so raised can be determined in that suit, but such determination would not affect the Constitutionality of the entire Judiciary Article.

Decree affirmed, each party to pay own costs.

Mr. Justice ROBERTS files a concurring Opinion, in which Mr. Justice JONES joins.

Mr. Justice COHEN files a dissenting Opinion.

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* See particularly Sections 1-10; Sections 16, 17, 18, 20, 21, 25.

** See particularly Sections 1, 3, 6, 7, 8, 12, 18 and 20.

APPENDIX A-2.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 38 MAY TERM, 1969

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

CONCURRING OPINION.

ROBERTS, *J.* FILED: February 7, 1969

I concur in the result reached by the majority in affirming the decree of the court below. However, I deem it appropriate to discuss further appellants' contentions dealing with the abrogation of the right to habeas corpus, the right to civil jury trial and the King's Bench powers of this Court.

Appellants urge in their brief that "in the Judiciary Article . . .; for all its verbiage nowhere does it tell us in which court the great writ of habeas corpus is for all time to be found, and protected from the ill winds of political chicanery." This statement on its face appears correct; however, appellants' inquiry into the future viability of the writ of habeas corpus should not end with Article V. Certainly the Constitution is an integrated document and clauses in one article must be read in light of the provisions of all the others. It is made quite clear in Article I, Section 14 "that the privilege of the writ of habeas corpus shall not be suspended." And lest it be thought that while not suspended, the Legislature might choose to withdraw jurisdiction over such writs from the courts of this Commonwealth, Section 11 of the same Article clearly provides "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Therefore, it is abundantly clear that the "Great Writ" retains its historical character as the ultimate and essential safeguard of individual rights and that the courts of the Commonwealth of Pennsylvania must and will continue to make its protections available.

Appellants also contend that the Constitutional Convention abrogated the right to trial by jury in civil cases. To support this argument they point to Section 25 of Article V: "Section 25. Dispensing with Trial by Jury.—*Until otherwise provided by law,* the parties, by agreement filed, may in any civil case dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same. . . ." (Emphasis supplied.) While appellants concede that the unitalicized portion merely grants civil litigants the right to waive a jury trial, their argument is that "Until otherwise provided by law . . ." means that the Legis-

lature can provide another procedure other than mutual waiver which will result in the abrogation of the right to trial by jury.

However, I find that argument particularly unpersuasive. The error in appellants' reasoning lies in the narrow interpretation they place on the meaning of the word "law." It is my view that such a narrow interpretation not only was not intended by the framers of this Section, but also would yield an unreasonable result. For if the appellants are correct, what would be the meaning of Article I, Section 6, which guarantees "Trial by jury shall be as heretobefore, and the right thereof remain inviolate"? The better view is that the word "law" includes not only statutory law, but also case law and constitutional law. Thus, so long as Article I, Section 6 is not repealed or amended by a future constitutional convention or constitutional amendment, any statutory law which attempted to change the right to trial by jury in civil cases would be a nullity.

The third contention of appellants to which I want to address myself is that dealing with the elimination of this Court's King Bench powers and the failure to provide for separation of powers between the legislative and judicial branches of our government. Appellants' argument focuses on Section 2(c) of new Article V, which states "Section 2. Supreme Court.—The Supreme Court . . . (c) shall have such jurisdiction as shall be provided by *law*." (Emphasis supplied.) Once again appellants' reasoning is based on an erroneous and excessively narrow construction of the word "law." They would have us interpret "law" to mean only legislatively passed statutory law and then view this Court's jurisdiction as completely at the whim and caprice of the Legislature.

However, such an interpretation of a broad word like "law" is erroneous in this context. The preferred inter-

pretation of that clause *must* include not only statutory law, but also case law, Pennsylvania Constitutional law, and United States Constitutional law. When viewed in this light, it is obvious that the jurisdiction of the Pennsylvania Supreme Court is still very much intact and that action by the Legislature can in no way restrict our essential judicial functions. First, the new Constitution provides in Article V, Section 1 that "The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court . . . ." Further, Section 2 of the same Article announces "The Supreme Court (a) shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth." Finally, Section 10 of the Constitution explicitly establishes that "The Supreme Court shall have general supervisory and administrative authority over all the courts and justices of the peace" and that it "shall have the power to prescribe general rules governing practice, procedure and conduct of all courts."

All of these quoted provisions are *constitutional* and the guarantees and safeguards inherent in these provisions could *never* be limited or eliminated simply by legislation. In addition, there are other functions inherent in the Commonwealth's judicial power which are required by federal constitutional law. It could never be validly asserted that these requirements might be amended or restricted by an act of the Pennsylvania Legislature. In short then, and without citing specific examples, it is my view that to read Article V, Section 2(c) to mean that the Legislature has complete plenary control over the jurisdiction of this Court is completely incorrect; therefore appellants' argument that the essential separation of powers has been violated must fail. The Legislature, in attempting to define the jurisdiction of this Court, cannot infringe on the limitations, as

judicially interpreted, that are in the Pennsylvania and United States Constitutions.

Appellants in a like manner argue that the King's Bench powers of this Court as set out in the Act of May 22, 1722, 1 Sm. L. 131, § XIII, have been eliminated. But, even a cursory glance at the judiciary provisions of the Constitution indicates that this argument is without merit. In fact, it appears that some of the original King's Bench powers of our Court have now been recited in the Constitution. First, the Court has constitutionally enunciated power to remove and disclipine judges under Article V, Section 18(h). In addition, the right to transfer judicial manpower in light of the overall needs of the Commonwealth is set out in Section 10(a) of the same Article. Further, the provisions of Section 10 quoted above clearly describe the general supervisory and administrative authority of the Supreme Court over all other courts and justices of the peace. Finally, Article V, Section 2 provides, in the last analysis, conclusive response to the appellants' concern. This clause speaks of the "supreme judicial power" reposing in this Court and can mean no less than that this Court possesses every judicial power that the people of the Commonwealth can bestow under the Constitution of the United States. I think that these considerations taken together obviously illustrate that the King's Bench powers of this Court have in no way been restricted. The judicial power reposed in this Court will continue as before unimpaired by any mistaken notion that the Legislature has the constitutional authority to diminish, curtail or interfere with its functions.

APPENDIX A-3.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT.

No. 38, MAY TERM, 1969.

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

DISSENTING OPINION.

COHEN, *J.*

In *Wells v. Bain*, 75 Pa. 39, 47 (1874), Chief Justice Agnew wrote that there are "but three known recognized modes by which the whole people, the state, can give their consent to an alteration of an existing lawful frame of government, viz:

"1. The mode provided in the existing constitution.

"2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people.

"3. A revolution."

"The first two are peaceful means through which the consent of the people to alterations is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government the remedy of the people is in the third mode—revolution."

Even if we ignore appellant's contention that Act No. 2 of the 1967 Session did not properly follow Article 18 of the 1874 Constitution, we must, nevertheless, determine whether a proper body for revision of the existing lawful frame of government was constituted by Act No. 2. I am constrained to hold that because section 2 of the Act provides for 13 *ex officio* members in addition to 150 elected delegates, that the *ex officio* members so dilute the elected body established for revision of the frame of government that it is not representative of the whole people and hence, unlawful and void.[1]

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1. Section 2 provides, inter alia:

". . . In addition, the Lieutenant Governor, the President Pro Tempore of the Senate, the Majority Leader of the Senate, the Majority Whip of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Leader of the House, the Majority Whip of the House, the Minority Leader of the House, the Minority Whip of the House and the Minority Caucus Chairman of the House shall be members ex officio of the convention and shall have the powers of elected delegates."

The essence of a constitutional convention is only maintained if it represents the people. It is a substitute for the gathering of the entire populace. The presence of *ex officio* delegates exercising the full powers of elected delegates is foreign to the concept of a convention as a gathering of the people. Thus, there was no convention and nothing which flowed from it is valid even if the product of the convention is subsequently approved by the majority of the voters.

I recognize that the leadership of the General Assembly that approved the Act held within their political power the "yes" or "no" on whether a constitutional convention should be called. But those in favor of a convention should not have surrendered the very essence of government in order to have the General Assembly pass the call. The cost was too high. It permitted the leadership of the General Assembly to become part of the convention without exposing themselves to the will of the people, and to influence, if not control, the convention's deliberations.[2] I

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2. Section 5 provides, inter alia:

"The Lieutenant Governor, the President Pro Tempore of the Senate the Majority Leader of the Senate, the Majority Whip of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Leader of the House, the Majority Whip of the House, the Minority Leader of the House, the Minority Whip of the House and the Minority Caucus Chairman of the House shall constitute a Preparatory Committee to make arrangements for the convention. . . . The committee shall initiate any studies, inquiries, surveys or analyses it may deem relevant through its own personnel or in cooperation with any public or private agencies, including institutes, universities, foundations or research organizations. In so doing, the committee may hold public or private hearings. It may issue subpoenas under the hand and seal of its chairman commanding any person to appear before it and to answer questions touching matters properly being inquired into by the committee and to produce such books, papers, records and documents as the committee deems necessary. Such subpoenas may be served upon any person and shall have the force and effect

see a dangerous threat to government as we know it by acquiescing in this unprecedented usurpation.[2a]

I cannot accept the contention that all prior improprieties and illegalities are rectified by the ratifying vote of the electorate.[3] Procedures in government instituted for the protection of the mass of people are designated to

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of subpoenas issued out of the courts of this Commonwealth. . . . The committee may request and shall receive from any department, division, board, bureau, commission or agency of the State or any political subdivision thereof such facilities, assistance and data as it deems necessary or desirable to carry out properly its powers and duties. The committee is hereby authorized and empowered to make and sign any agreements, and to do and perform any acts that may be necessary, desirable or proper to carry out the provisions of this act. The committee shall also prepare budgets for the holding of the constitutional convention. . . ."

2a. ". . . Common sense would indicate that delegates intended to represent, first, the electoral body, and, through that, the sovereign, if they are to represent truly the different phases of opinion current among the people at large, should be *chosen by the entire electoral body*. . . ." (Emphasis supplied). Jameson, Constitutional Conventions, page 258 (4th ed. 1887). No precedent can be found in any authority on constitutional conventions for the inclusion of *ex officio* members.

3. The "People's Convention" of Rhode Island in 1841 as described in *Luther v. Borden*, 7 How. 1 (1849), provides a useful analogy. Mass voluntary meetings were held in Providence which resulted in the appointing of a committee with the power to call a constitutional convention. The committee made the call, providing for full and free voting in Rhode Island. *The Constitution as prepared by the convention was approved by the majority of the voters of the state.* The existing government refused to leave office or to recognize the new because it would not recognize a convention that resulted from the call of a voluntary group. The President of the United States, John Tyler, recognized the existing government and offered military aid in putting down the "rebellious" insurgents. The Supreme Court held in *Luther v. Borden* that this was a proper function of the President and thus upheld his determination. The lesson to be learned from the Rhode Island experience is that the subsequent approval of a constitution by the populace does not cleanse the taint that surrounds the convention that evolved that constitution.

protect them from the rule of the majority. Our concepts of democracy and minority rights have far transcended the philosophy that "might makes right."

I dissent.

APPENDIX B-1.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT.

No. 3, MAY TERM, 1969.

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM ORDER OF THE ORDER OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

OPINION OF THE COURT.

BELL, *C. J.* FILED: OCTOBER 11, 1968

This is an appeal from an Order denying a preliminary injunction. In such a case, the issue before this Court and our scope of review is whether there was a clear abuse of discretion, or palpable legal error, and the merits of the case are not considered or decided: *City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees' Union,* 413 Pa. 420, 436, 197 A. 2d 614; *McDonald v. Noga,* 393 Pa. 309, 311, 141 A. 2d 842.

In *McDonald v. Noga,* 393 Pa., supra, the Court said (page 311):

"On an appeal from a decree granting or refusing a preliminary injunction, the appellant has a very heavy burden to overcome; such a decree will not be interfered with upon appellate review in the absence of a plain abuse of discretion by the court below: Aldrich v. Geahry, 360 Pa. 376, 379, 61 A. 2d 843. . . ."

In *City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees' Union,* 413 Pa., supra, the Court said (page 436):

"On an appeal from the grant or refusal of a preliminary injunction, the test in this Court is well settled. We consider and *decide, not the merits of the merits of the case** but only whether there were *any apparently reasonable or justifiable grounds*** for the action of the Court below; and if such exists, the Decree (or Order) will be affirmed unless the record presents palpable legal error: Philadelphia v. Philadelphia Transportation Co., 386 Pa. 231, 236, 126 A. 2d 132; see also Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 145, 189 A. 2d 271; Sherwood v. Elgart, 383 Pa. 110, 117 A. 2d 899; Alabama Binder & Chemical Corp. v. Pennsylvania Industrial Chemical Corp., 410 Pa. 214, 189 A. 2d 180; Lindenfelser v. Lindenfelser, 385 Pa. 342, 123 A. 2d 626."

We place our decision on the well recognized ground that there was no clear abuse of discretion, or palpable legal error.

Order affirmed, each party to pay own costs.

Mr. Justice JONES files a concurring Opinion. Mr. Justice EAGEN files a concurring Opinion. Mr. Justice MUSMANNO files a dissenting Opinion.

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* Italics, ours.

** Italics in original Opinion.

APPENDIX B-2.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT.

No. 3, MAY TERM, 1969.

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM ORDER OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

CONCURRING OPINION.

JONES, *J.* FILED: OCTOBER 11, 1968

I would affirm the decree of the court below which denied injunctive relief. However, in so doing, I neither consider nor determine the *merits* of the issues raised in the court below.

Affirmance of this decree seems mandated for two reasons. First, the relief sought in the court below was to restrain submission to the electorate at the Primary Election of April 23, 1968 for approval or disapproval of

certain amendments to our Constitution; such election has been held, the relief sought cannot be now granted and we, therefore, are presented with no justiciable controversy on this appeal. Second, it has long been the established and salutary rule that on an appeal from the denial of a preliminary injunction the appellate court will not reverse if there existed *any* reasonable ground to sustain the denial of injunctive relief and the court below did not commit any *palpable* error of law. See: *City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees' Union*, 413 Pa. 420, 197 A. 2d 614 (1964); *McGinley v. Scott*, 401 Pa. 310, 164 A. 2d 424 (1960). The court below did have a reasonable ground for and committed no palpable legal error in denying injunctive relief.

I would affirm the decree without prejudice to appellants to raise any issues involving the merits of this controversy in another more appropriate proceeding.

APPENDIX B-3.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 3 MAY TERM, 1969

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR.,
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

CONCURRING OPINION.

EAGEN, *J.*: FILED: October 11, 1968

I am of the view that the lower court had apparent reasonable ground for refusing a preliminary injunction in this case and, therefore, under the long established rule limiting our scope of review, we must affirm. However, the case presents serious questions which should be resolved without further undue delay. This can be accomplished by this Court assuming original jurisdiction and issuing the special writ of certiorari requested in a related case.

I earnestly urge the Court to grant the Writ and schedule argument thereon at the earliest possible date.

APPENDIX B-4.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 3 MAY TERM, 1969

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR.,
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA

No. 390, MISCELL. DOCKET

IRVIN STANDER AND ALEXANDER H. LINDSAY
Appellants

v.

JOSEPH J. KELLEY, JR.
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF No. 197 COMMONWEALTH DOCKET 1968, No. 2859, EQUITY DOCKET.

DISSENTING OPINION.

MUSMANNO, *J.*

I dissent in these cases from the decisions of this Court affirming the decree of the Court of Common Pleas of

Dauphin County and refusing the petition for the issuance of a special writ of certiorari for original jurisdiction. Since both actions involve the same subject matter I will write only one Opinion which will apply to both proceedings.

My learned Brother Jones in his Concurring Opinion in the Dauphin County case states that he affirms without prejudice to the appellants "to raise any issues involving the merits of this controversy in another more appropriate proceeding." I interpret this to mean that Justice Jones is not entirely satisfied that the new Judiciary Article conforms to established constitutional principles and therefore he is willing the appellant raise the issues in another future legal action.

I would meet the issue headon—now. It is much easier to straighten out a malforming constitutional structure while the concrete is wet then it would be after it has hardened into grotesque solidity. The time to straighten out a tree damaged in the planting is while it is still growing and not after it has attained a full but convoluted height.

The Constitutional Convention of 1968 (for convenience hereinafter referred to as the ConCon, the name by which it was constantly designated in the newspapers) exceeded its authority. It must never be overlooked that the ConCon was a limited convention, not a plenary one. It was bound by the Constitution of 1874 and had no authority whatsoever to go beyond the limitations spelled out in the Enabling Act No. 2 of March 15, 1967. That Act, approved by the people, specified the areas in which the ConCon could operate in the judicial field. Those areas were as conspicuously circumscribed as if they were surrounded by walls. The ConCon had no authority whatsoever to go beyond those walls. What were the circumscribed areas? ADMINISTRATION, ORGANIZATION, SELECTION, TENURE. The ConCon broke down those walls and trespassed into the

area of JURISDICTION, where it had no right to be *at all*. This is so fundamental and elementary that I cannot but be amazed that this Court treats the matter in so summary a fashion, especially since the ConCon's trespassing involves the very lifeblood of this Court itself, jurisdiction. The ConCon had no more right to change our jurisdiction than it would have had to legislate the judicial system to be inaugurated on the Moon if and when we land our valiant astronauts there.

Article V, Section 1 of the Constitution of 1874 declares the jurisdiction of this Court to be:

> "Article V. Section 3. The jurisdiction of the Supreme Court shall extend over the State, and the judges thereof shall, by virtue of and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction by appeal, certiorari or writ of error in all cases, as is now or may hereafter be provided by law."

That Article was inviolable, it was sacred to the divine principles of justice, it was the altar on which rested the guarantees of the freedom of a free people. Because, talk as much as one may about liberty and the unfettered conscience of man, unless one has a court within which to demand those rights they may as well be printed on rubber balloons that waft into the empty air and blow away over the ocean of endless wastes.

The ConCon, although not empowered to touch the 1874 constitutional provision on judicial jurisdiction, not only touched it, but ripped it apart. It deprived our Court of

original jurisdiction over habeas corpus, quo warranto, mandamus, and corporate injunction cases. Under what authority? By what mandate? Ever since I had the honor of becoming a member of this Court, I have glowed inwardly in the realization that if anyone was unjustly imprisoned or deprived of his liberty, and no Common Pleas Court was open to issue a writ of habeas corpus, I was always available to unlock jail doors or sever the bonds of any illegal detention, but not now, according to ConCon.

Indeed, the writ of habeas corpus has completely disappeared from the Constitution, according to ConCon. Nowhere in the vast undulating prairie of its some 8000 words can one find a single blade of grass stamped *habeas corpus*, even though, dating as far back as Magna Charta, Habeas Corpus has always been the mightiest oak in the whole domain of individual rights.

It may be argued, and has been argued that the jurisdiction of the Courts, under the new judiciary article, remains as it was. But this is a play in dialectics because a Constitution speaks affirmatively and not negatively, it imparts principles of government by specific, objective statements, and not by inference. When the ConCon erased from the Constitution all language on the original jurisdiction of the Supreme Court and said, through Sec. 2(c) that the Supreme Court "shall have such jurisdiction as shall be provided by law," it made the Supreme Court subservient to the Legislature, this in violent violation of the basic principle of American government, that each of the three departments shall have sovereign authority unto itself.

But the supporters of the new Judiciary Article asserted and still assert that the Supreme Court retains its original jurisdiction and point to Section 10(c) which provides:

"(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution *and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace* . . ." (Emphasis supplied.)

It will be noted by the italicized words that the Supreme Court becomes the servant of the Legislature. We have supreme power but it is the Legislature which determines jurisdiction. Why, jurisdiction is the very essence of judicial power! Take away jurisdiction and the courthouse becomes brick, motar and form.

Nor is the Supreme Court's jurisdiction saved by Section 1 of the Schedule to the Judiciary Article which states:

"The Supreme Court shall exercise all the powers and, until otherwise provided by law, jurisdiction now vested in the Supreme Court . . ."

Here again we have the limiting words unless "otherwise provided by law," that is, unless the Legislature determines to limit our jurisdiction. If the Legislature may limit our jurisdiction it may control the functions of the

Supreme Court. I must repeat my amazement that the majority of this Court can take so lightly such a hazard to the independent functioning of the highest Court in the Commonwealth.

In *Manges v. Dentler*, 33 Pa. 495, this Court, speaking through the distinguished Chief Justice Lowrie, said:

> ". . . These provisions are, therefore, imperative limitations of legislative authority, and imperative impositions of judicial duty. To the judiciary they say: —You shall administer justice to all men by due course of law, and without sale, denial, or delay; and to the legislature they say: —*You shall not intermeddle with such functions . . .*" *Menges v. Dentler*, 33 Pa. 498 (1859). (Emphasis supplied.)

The ConCon has intermeddled with jurisdictional functioning and that intermeddling should be declared unconstitutional—now!

The Pennsylvania Bar Association attempted to hold inviolate the separation of powers between the Legislative and Judicial Departments by its Delegate Proposal No. 1000 Section 2(b) and 14(b), which stated:

> "The Supreme Court shall be the highest court of the Commonwealth and shall have final appellate jurisdiction. It shall have no original jurisdiction except as may be expressly provided in this constitution. It may assume jurisdiction of actions pending in any other court at any stage of the proceedings. It shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction . . ."

> "The Supreme Court shall have power to prescribe rules in all civil and criminal actions and proceedings for all courts, governing administration, prac-

tice and procedure, including rules of evidence, appeals, appellate jurisdiction including time for appeals, and the issuance of all writs necessary or appropriate in aid of the jurisdiction of the respective courts. These rules shall have the force and effect inconsistent therewith."

Somehow these safeguards were washed overboard in the storm which engulfed the ConCon as it struggled to get into port before Adjournment Day.

The Pittsburgh Press, editorializing on the New Judiciary Article before adoption, declared that the invasion by the Legislative Department into the Judiciary Department of the State Government constituted a "fatal flaw" in the Judiciary Article. Its exposition is so able and so unanswerable in its logic that I incorporate it by reference into this Dissenting Opinion, a salient portion of which reads:

"It [the new Judiciary Article] could destroy the pattern of government which has served us throughout our history, the system of three independent, co-equal branches of government—the executive, legislative and judicial—all exercising separate powers defined in the constitution itself. It would do this by making the entire judicial establishment subservient to the Legislature. For no matter how you slice the 8190 words in this single proposal, this is what they spell.

"Unaccountably, the drafters of the judicial article failed to provide a guarantee of any specific powers for the State Supreme Court of any of the lower courts. In fact, adoption of this proposal would rub out even those provisions of the present constitution which specify the basic jurisdiction and powers of the

State Supreme Court. The proposal contains no language comparable to that of the U. S. Constitution which defines the jurisdiction and powers of the Federal Courts.

"In section after section, as applied to the State Supreme Court on down, the proposal states that the various courts shall have "such jurisdiction as shall be provided by law" or shall retain their present jurisdiction "until otherwise provided by law." In other words, the entire judicial system would be placed under the control of the Legislature."

I believe that it is the duty of this Court to take original jurisdiction at once of an issue which questions our very authority to function as an appellate court. Nothing could be more vital to the authority of this tribunal, which happens to be the oldest Supreme Court in the United States.

APPENDIX C.

IN THE

SUPREME COURT OF PENNSYLVANIA

No. 3 MAY TERM, 1969

ALEXANDER H. LINDSAY,

Appellant

v.

JOSEPH J. KELLEY, JR.,
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Alexander Lindsay, appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania entered in this action on February 7, 1969. This appeal is taken pursuant to 28 USC 1257(2).

II. The Prothonotary of the Supreme Court of Pennsylvania will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include all of the record in possession, particularly the following:

1. All docket entries.
2. All opinions and orders of the Supreme Court of Pennsylvania, particularly those of October 11, 1968 and February 7, 1969.
3. All briefs of counsel.

III. The Prothonotary of the Commonwealth Court, Court of Common Pleas, Dauphin County, will please prepare a transcript of the record in this cause, captioned there Court of Common Pleas of Dauphin County at No. 197, Commonwealth Docket 1968, No. 2859 Equity Docket, for transmission to the Clerk of the Supreme Court of the United States and include therein any part of the record now in its possession which had been certified to the Supreme Court of Pennsylvania.

JAMES E. BEASLEY, ESQUIRE,
525 Broad Locust Building,
1405 Locust Street,
Philadelphia, Pa. 19102

PROOF OF SERVICE

I, James E. Beasley, Esquire, counsel for appellant, hereby certify that copies of this Notice of Appeals have been sent this 24th day of April, 1969, at 4:00 o'clock P. M., by registered mail to Joseph J. Kelly, Jr., Secretary of the Commonwealth of Pennsylvania, defendant and appellee, and Edward Friedman, Counsel General, and William C. Sennett, Attorney General, counsel for the appellee, and to Ira B. Tiger, Ralph S. Snyder, Samuel D. Slade and Bernard G. Segal, Esquires, counsel for Amicus Curiae, Pennsylvania Bar Association, at their registered office addresses.

JAMES E. BEASLEY.